A **PM SECURITIES SDN BHD**

v.

WONG NAM SENG & ORS

B COURT OF APPEAL, PUTRAJAYA
LOW HOP BING JCA
HISHAMUDIN MOHD YUNUS JCA
LINTON ALBERT JCA
[CIVIL APPEAL NO: W-02-48-2010]
C 18 MAY 2012

CIVIL PROCEDURE: *Judgments and orders - Appeal against - Appeal against judgment of High Court - Pledged shares - D1 and D2 owed appellant sum of money from margin facility agreements - D3 acted*
D *as guarantor to D1 and D2 by loaning shares in Guanrantee Agreement - One year period to repay amount - Appellant pledged shares to banks - Banks sold shares within moratorium period - Whether D3 had breached GA when amount due not yet settled*

CONTRACT: *Guarantee - Breach of contract - Pledged shares - D3's*
E *shares pledged to banks by appellant - Shares sold within moratorium period - Whether D3 under obligation to indemnify appellant - Whether D3 had breached Guanrantee Agreement when amount due not yet settled*

The appellant in this case is a member of the Kuala Lumpur
F Stock Exchange ('KLSE') and is licensed to trade in stocks and shares on the KLSE. With financial backing from the third defendant ('D3'), the first and second defendants ('D1' and 'D2' respectively) had opened trading accounts with the appellant for margin trading on the KLSE. D3 had lent his shares ('Innovest
G shares') to D1 and D2 with the understanding that the Innovest shares would be returned to D3 on or before December 1997. The Innovest shares were deposited by D1 and D2 with the appellant who then had pledged the shares to various banks. However, in October and November 1997, as a result of the Asian
H Financial Crisis, the prices of shares fell drastically, including Innovest shares. Soon enough, D3 had asked D1 and D2 to return Innovest shares but they were unable to do so. Thus, when D1 and D2 had failed to settle the amounts owing under the margin facility agreements, a total sum of RM49,097,069.70,
I D3 had stepped in as a guarantor and signed a Guarantee Agreement ('GA') on 27 February 1998 between himself and the

appellant. In the GA, it was stated in cl. 1.1 that the appellant would agree 'not to liquidate D1 and D2's account and not to commence civil suits against them'. It was also stated in the GA that D3 was given nine months with a three month grace period from the date of the agreement to 'charge or cause to be charged to appellant … any land/assets … at an aggregate sum of not less than RM30,705,800.76'. Subsequently, the Innovest shares were sold to the banks during the months between April and December 1998. The appellant contended that due to cl. 4.2 concerning events of default, it was entitled to claim against D3 as guarantor whereas D3 argued that the appellant had breached the GA when it allowed the sale of the Innovest shares during the one-year moratorium period. The crucial issue in this appeal revolved around the interpretation of the GA.

Held (dismissing the appeal with costs)
Per Hishamudin Mohd Yunus JCA (Linton Albert JCA concurring) delivering judgment of the majority:

(1) The correct interpretation of the GA, in particular cl. 1.1 read with Preamble B, was that a sale of the Innovest shares by the banks must be deemed to be a sale by the appellant. For it was the appellant who had pledged those shares with the banks. The appellant was, therefore, under a duty under the GA to ensure that the banks do not sell those shares. Further, the appellant had prior knowledge of the banks' intention to sell the shares at a future date. Therefore the appellant had committed a fundamental breach of the GA. (para 38)

Per Low Hop Bing JCA (dissenting):

(1) According to cl. 3.1 of the GA, D3 had agreed to indemnify and guarantee the appellant against any loss, damage or expense that the appellant may suffer as a result of or arising from or otherwise relating to the GA. Thus, based on the clear and unambiguous words used in cl. 3.1 of the GA, D3's contractual obligation to indemnify the appellant was undoubted. (paras 47-49)

A ***Bahasa Malaysia*** *Translation Of Headnotes*

Perayu di dalam kes ini adalah ahli kepada Bursa Saham Kuala Lumpur ('KLSE') dan mempunyai lesen untuk berdagang saham dan stok di KLSE. Dengan bantuan kewangan daripada defendan
B ketiga ('D3'), defendan pertama dan kedua (masing-masing 'D1' dan 'D2') telah membuka akaun dagangan saham dengan perayu untuk perdagangan margin di KLSE. D3 telah meminjamkan saham-sahamnya ('saham-saham Innovest') kepada D1 dan D2 dengan persefahaman bahawa saham Innovest akan dipulangkan
C kepada D3 sebelum atau pada Disember 1997. D1 dan D2 telah mendepositkan saham-saham Innovest dengan perayu yang kemudiannya telah mencagarkan saham-saham tersebut kepada pelbagai bank. Namun, pada Oktober dan November 1997, akibat Krisis Kewangan Asia, harga saham-saham telah jatuh dengan
D mendadak, termasuk saham-saham Innovest. Tepat pada masa, D3 telah meminta D1 dan D2 untuk mengembalikan saham-saham Innovest tetapi mereka tidak dapat berbuat demikian. Oleh itu, apabila D1 dan D2 gagal untuk melangsaikan amaun yang terhutang di bawah perjanjian-perjanjian margin sejumlah
E RM49,097,069.70, D3 telah campur tangan sebagai penjamin dan telah menandatangani Perjanjian Jaminan ('GA') pada 27 Februari 1998 antara beliau dan perayu. Di dalam GA, telah dinyatakan di dalam kl. 1.1 bahawa perayu akan bersetuju untuk tidak melupuskan akaun-akaun D1 dan D2 dan tidak memulakan guaman
F sivil terhadap mereka. Telah dinyatakan juga di dalam GA bahawa D3 diberi masa sembilan bulan bersama tempoh tangguh selama tiga bulan dari tarikh perjanjian untuk 'menggadaikan atau menyebabkan gadaian pada perayu ... mana-mana tanah/aset ... dengan harga agregat tidak kurang daripada RM30,705,800.76'.
G Kemudiannya, saham-saham Innovest telah dijualkan kepada bank-bank pada bulan-bulan antara April dan Disember 1998. Perayu telah mendakwa bahawa berdasarkan kl. 4.2 berkaitan kejadian keingkaran, beliau berhak untuk membuat tuntutan terhadap D3 sebagai penjamin. Manakala, D3 telah berhujah bahawa perayu
H telah memungkiri GA apabila perayu membenarkan penjualan saham-saham Innovest semasa tempoh moratorium selama setahun itu. Isu yang penting di dalam rayuan ini berkisar tentang interpretasi GA.

I

Diputuskan (menolak rayuan dengan kos)
Oleh Hishamudin Mohd Yunus HMR (Linton Albert HMR menyetujui) menyampaikan penghakiman majoriti:

(1) Interpretasi yang betul tentang GA, khususnya kl. 1.1 dibaca bersama Preamble D, adalah penjualan saham-saham Innovest oleh bank haruslah dianggap penjualan oleh perayu kerana perayu merupakan individu yang telah mencagarkan saham-saham tersebut kepada bank-bank. Perayu, dengan itu, mempunyai kewajipan di bawah GA untuk memastikan bank-bank tidak menjual saham-saham tersebut. Tambahan, perayu telah pun mempunyai pengetahuan awal tentang hasrat bank untuk menjual saham-saham tersebut pada waktu yang akan datang. Oleh yang demikian, perayu telah melakukan suatu kemungkiran penting di bawah GA.

Oleh Low Hop Bing HMR (menentang):

(1) Menurut kl. 3.1 di dalam GA, D3 telah bersetuju untuk menanggung ganti rugi dan menjamin perayu daripada sebarang kerugian, kerosakan atau perbelanjaan yang mungkin dialami oleh perayu akibat atau berbangkit daripada atau berkenaan dengan GA. Oleh yang demikian, berdasarkan perkataan jelas dan nyata yang digunakan di dalam kl. 3.1. GA, kewajipan kontrak D3 untuk menanggung ganti rugi perayu adalah tidak disangkal.

For the appellant - Jasvinder Kaur; M/s Azim, Tunku Farik & Wong
For the respondent - Datuk Watson Peters (Navinder Singh with him); M/s Watson Peters & Mohd Fuad

[Appeal from High Court, Kuala Lumpur Civil Suit No: D5-22-901-2001]

Reported by Baizura Abd Razak

JUDGMENT

Hishamudin Mohd Yunus JCA:

[1] This is an appeal against the decision of the High Court of Kuala Lumpur of 30 November 2009.

[2] The learned Judicial Commissioner (as she then was) of the High Court of Kuala Lumpur, in her decision, had, after a full trial, dismissed the appellant's (PM Securities Sdn Bhd – the plaintiff

before the High Court) claim against the third respondent (Wong Yeon Chai – the third defendant at the High Court) for breach of a Guarantee Agreement.

[3] There were two other defendants, besides the third respondent/third defendant, in the High Court proceedings, namely, the first and second defendants (two individuals by the name of Wong Nam Seng and Tay Leong Kooi, respectively). The appellant/plaintiff had obtained default judgment against them on 23 October 2001. They have not appealed against that default judgment. Although in this appeal the appellant has cited the first and second defendants as the first and second respondents, respectively, this appeal, actually, does not concern them: it only concerns the third respondent/third defendant.

[4] In this judgment I will be referring to the appellant as 'the plaintiff'; and to the third respondent, as 'the third defendant'.

[5] On 28 June 2011, having heard submissions, this court reserved judgment.

[6] Today, we give our judgment.

[7] On my part, I am dismissing the appeal with costs.

[8] I find that this appeal has no merits.

[9] I shall elaborate.

[10] I shall begin by briefly alluding to the facts of the case.

[11] The plaintiff, a private limited company, is a member of the Kuala Lumpur Stock Exchange (KLSE), licensed to trade in stocks and shares on the KLSE.

[12] The first and second defendants had opened trading accounts with the plaintiff for the purpose of trading in shares.

[13] The plaintiff extended to them margin trading facilities *via* margin facility agreements. They, however, failed to settle the amounts owing under the margin facility agreements.

[14] The plaintiff's claim against the first defendant under the margin facility agreement is for a sum of RM25,079,274.34 (owing as at 31 January 2001).

[15] The plaintiff's claim against the second defendant under the margin facility agreement is for a sum of RM24,017,795.36 (owing as at 31 January 2001). A

[16] On 27 February 1998, the third defendant entered into a Guarantee Agreement with the plaintiff. By this Guarantee Agreement, the third defendant guaranteed the payment of the sums owing by the first and second defendants to the plaintiff under the margin facility agreements. B

[17] The plaintiff's claim against the third defendant is for a sum of RM49,097,069.70 (RM25,079,274.34 + RM24,017,795.36) being the total sum due from the first and second defendants under the margin facility agreements and guaranteed by the third defendant under the Guarantee Agreement. C

[18] As said earlier, the plaintiff had obtained default judgment against the first and second defendants. D

[19] This is how the third defendant came about to be a guarantor for the first and second defendants. Originally, that is to say, at the time when the first and second defendants entered into the margin facility agreements with the plaintiff, the third defendant was not a guarantor of the first and second defendants. He became a guarantor only later. E

[20] What had happened was that, the first and second defendants, after entering into the margin facility agreements with the plaintiff, wanted to do margin trading on the KLSE. In order to do so, they need shares as a deposit – to be deposited with the plaintiff company. They, therefore, borrowed the third defendant's shares and used them as a deposit. The shares that they borrowed from the third defendant were the shares of a public listed company called Innovest Bhd (hereinafter, the shares will be referred to as 'the Innovest shares'). F G

[21] The third defendant lent the first and second defendants his Innovest shares on the understanding that the shares would be returned to him on or before December 1997. H

[22] Having deposited the Innovest shares with the plaintiff company, the first and second defendants then commenced active trading in shares on the KLSE. In October and November 1997, as a result of the Asian Financial Crisis, the price of shares on the KLSE fell drastically. Innovest shares too were badly affected. The I

A third defendant asked the first and second defendants to return the Innovest shares to him, but they were unable to do so because of the drastic drop in the share price.

[23] The third defendant was concerned about his Innovest
B shares. He wanted to safeguard his shares but at the same time he also wanted to help the first and second defendants. So he held discussions with one Mr Eddy Leong, the Executive Director of the plaintiff company, to find a way to resolve the problem. The third defendant was confident that his Innovest shares would
C regain their value within a year. Following the discussions with Eddy Leong, the third defendant signed the Guarantee Agreement of 27 February 1998.

[24] Now, what had happened was that after the first and
D second defendants had deposited the third defendant's Innovest shares with the plaintiff, the latter pledged the shares to various banks. The banks subsequently notified the plaintiff that they intend to force-sell those shares, but that they would withhold forced selling of the Innovest shares up to 2 October 1998. The
E plaintiff, in turn, notified the second defendant of what the banks had notified the plaintiff. The plaintiff also informed the second defendant that it was not in a position to prevent any forced selling by the banks after the specified date (2 October 1998).

[25] Following the failure on the part of the first and second
F defendants to pay the outstanding sums due and owing to the plaintiff, letters of demand were sent by the plaintiff to them.

[26] The third defendant also received a letter of demand from the plaintiff dated 20 July 1999 demanding a sum of
G RM35,857,772 as at 30 April 1999, with interest at 18% per annum.

[27] The value of the Innovest shares in the first defendant's account as at 31 October 1997 was RM24,883,500.

H **[28]** The value of the Innovest shares in the second defendant's account as at 31 October 1997 was RM24,891,450.

[29] The pledged Innovest shares were sold by the banks on the following dates; 12 April 1998, 12 July 1998, 10 September 1998,
I 5 October 1998, 6 October 1998, 7 October 1998, 8 October 1998, 9 October 1998, 10 October 1998, 13 October 1998, 24 November 1998, 25 November 1998 and 7 December 1998.

[30] The issue in this appeal revolves around the interpretation of the Guarantee Agreement. Parts A and B of the Preamble to the Guarantee Agreement read:

WHEREAS:

A. The Guarantor acknowledges that as at the 14th November 1997,

(a) Tay Leong Kooi (NRIC No. 730308-07-5493) of Regal Villa, Jalan Penggawa, Off Jalan U-Thant, Ampang Hilir, 55000 Kuala Lumpur, and

Total Holding	Quantity
Innovest Bhd	3,131,000

(b) Wong Nam Seng (NRIC No. 470701-06-5023) of 26 Jalan Semantan 2, Damansara Heights, 50490 Kuala Lumpur

Total Holding	Quantity
Innovest Bhd	3,130,000

(hereinafter jointly called "the Debtors") are indebted to PSSB in the aggregate sum of RM30,705,800.76 being the aggregate sum due and outstanding from the Debtors under their respective margin trading accounts with PSSB (hereinafter called "the Debt" which expression includes the balance thereof outstanding, interest on the sum of RM30,705,800.76 at 14.5% per annum accruing from the 14th day of November 1997 as well as all sums of money which are now or shall from time to time or at any time hereafter be due or owing by the Debtors and/or the Guarantor to PSSB).

B. At the request of the Guarantor, PSSB has agreed not to exercise its right:

(a) to liquidate the Debtors' respective margin trading accounts by selling the outstanding positions and/or the pledged shares in the said accounts; or

(b) to commence civil suits against the Debtors for the immediate recovery of the Debt;

A and to allow the Debtors to regularize the said accounts and/ or pay the Debt within nine (9) months from the date hereof in consideration of which the Guarantor has agreed to enter into this Agreement and to perform the terms set out hereinafter.

B **[31]** Clause 1.1 of the Guarantee Agreement reads:

1. Agreement to Charge

1.1 In consideration of PSSB agreeing or having agreed at the request of the Guarantor, subject to the terms of this Agreement, not to exercise its rights to liquidate the Debtors' respective margin trading accounts by selling the outstanding positions and the pledged shares in the said accounts or to commence civil suits against the Debtors for the immediate recovery of the Debt and to allow the Debtors to regularize the said accounts and/or to pay the Debt within nine (9) months from the date hereof, the Guarantor hereby agrees that he shall, within nine (9) months hereof, charge or cause to be charged to PSSB, on such terms and conditions as shall be prescribed by PSSB any land and/or other assets acceptable to PSSB which are valued by one or more valuers acceptable to PSSB at an aggregate sum of not less than RM30,705,800.76.

[32] Clause 1.2 of the Guarantee Agreement provides:

1.2 In the event the Guarantor shall fail or be unable to charge or cause to be charged to PSSB any land and/or other assets acceptable to PSSB which are valued at an aggregate sum of not less than RM30,705,800.76 within nine (9) months as stipulated in Clause 1.1 the parties hereto mutually agree that the Guarantor shall be granted an extension of three (3) months within which to comply with Clause 1.1.

[33] Clause 1.3 of the Guarantee Agreement states:

1.3 The charge of the land and/or other assets in favour of PSSB shall, among others, contain provisions allowing the debtors a period of 3 years from the date of the charge to regularize the said accounts and/or pay the debts and during the aforesaid period of 3 years PSSB shall not in any way whatsoever make any demand for the repayment of the debts and/or liquidate the debtors' respective margin trading accounts by selling/transferring the outstanding positions and/ or the pledged shares in the said accounts and/or to commence any legal proceedings for the recovery of the debts.

[34] It is the contention of the plaintiff that it was entitled to claim against the third defendant as guarantor pursuant to cl. 4.2 (concerning events of default) of the Guarantee Agreement since the third defendant had failed to comply with its notice of demand of 20 July 1999, and therefore had breached the Guarantee Agreement.

[35] The third defendant, on his part, denies that he was in breach of the Guarantee Agreement. The third defendant takes the position that it is the plaintiff who is in breach of the Guarantee Agreement by allowing the Innovest shares (that the first and second defendants had deposited with the plaintiff), that the plaintiff had pledged to the banks, to be sold by the banks during the moratorium period, that is, during the one year period (nine months plus three months) with effect from the date of the Guarantee Agreement (27 February 1998). It is contended that the plaintiff is prohibited by cl. 1.1 read with preamble B of the Guarantee Agreement from selling the deposited Innovest shares during the one-year moratorium period.

[36] The plaintiff, in turn, argues that it was not they who had sold the Innovest shares: it was the banks (to whom it had pledged the shares). The plaintiff argues that under the Guarantee Agreement it does not give any assurance or undertaking that it will prevent the banks from selling those shares. So, the plaintiff contends, it was not in breach of the Guarantee Agreement.

[37] The learned trial judge, Amelia Tee JC (as she then was), in her grounds of judgment, did not accept the plaintiff's argument. Instead, she accepted the third defendant's argument. She made a finding that it is the plaintiff that is in breach of the Guarantee Agreement when it allowed the banks to sell the Innovest shares. In her conclusion she ruled:

> Based on the facts of the case and a proper construction of the Guarantee Agreement entered into between the parties, I find that the Plaintiff, by allowing the shares in the 1st and 2nd Defendants' margin trading accounts to be force sold during the moratorium period, was in breach of a fundamental term which affected the very foundation or sub-stratum of the Agreement. The very purpose for the 3rd Defendant to enter into the Guarantee Agreement, apart from assisting the 1st and 2nd Defendants, was to protect or safeguard the value of the Innovest shares deposited with the Plaintiff and to preserve them until the

worst of the economic crisis was over when he expected the shares to regain their value. The Plaintiff, by not preserving the shares during the moratorium period but allowing them to be sold, had destroyed the very fabric of the Guarantee Agreement.

[38] With respect, I am in agreement with the above view of the learned trial judge. A correct interpretation of the Guarantee Agreement (in particular cl. 1.1 read with preamble B) is that a sale of the Innovest shares by the banks must be deemed to be a sale by the plaintiff. For, it was the plaintiff who pledged those shares with the banks. The plaintiff is, therefore, under a duty under the Guarantee Agreement to ensure that the banks do not sell those shares. The plaintiff had prior knowledge of the banks' intention to sell the shares at a future date. It is a lame excuse on the part of the plaintiff to say that it was powerless to prevent the sales of the pledged shares by the banks. Therefore, the plaintiff had committed a fundamental breach of the Guarantee Agreement.

[39] My learned brother Justice Linton has read this judgment and agrees with it.

[40] [Appeal dismissed with costs.]

Low Hop Bing JCA (Dissenting):

Appeal

[41] This appeal concerns the respondent ("the third defendant") and the appellant ("the plaintiff") whose claim against the third defendant was dismissed by the learned Judicial Commissioner ("JC").

[42] Judgment in default (JID) has been entered against the first and second defendants, both of whom have not lodged any appeal against the JID.

Plaintiff's Claim

[43] The plaintiff's claim against the third defendant is for a sum of RM49,097,069.70 due and owing from the third defendant as guarantor pursuant to cl. 3.1 of the guarantee dated 27 February 1998 executed by the third defendant in favour of the plaintiff ("the guarantee") whereby the third defendant agreed to indemnify and guarantee the plaintiff against any loss, damage or expense that the plaintiff may suffer as a result of or arising from or otherwise relating to the guarantee.

Liability Under The Guarantee

[44] Ms Jasvinder Kaur, the plaintiff's learned counsel submitted, in essence, that the learned JC had erred in holding that the third defendant is not liable under the guarantee.

[45] On the other hand, Datuk Watson Peters (Mr Navinder Singh with him) contended for the third defendant that the learned JC was correct in her conclusion and urged that the plaintiff's appeal be dismissed.

[46] In my view, the core question for determination is:

> Upon a true construction of clause 3.1 of the Guarantee, and in view of the fact that the Debtors *viz* the First and Second Defendants have not appealed against the JID recorded against them, is the Guarantor liable to the Plaintiff under the Guarantee?

[47] Clause 3.1, where relevant, merits reproduction as follows:

> 3. Guarantee/Indemnity
>
> 3.1 The Guarantor hereby agrees to indemnify PSSB and to keep PSSB indemnified against any loss damage or expense that PSSB may suffer or incur as a result of or under arising from or otherwise relating to this Agreement and hereby irrevocably guarantees payment on demand upon the Guarantee of all money and liabilities whether certain or contingent now or hereafter owing or incurred to PSSB from or by the Debtors under arising from or otherwise relating to the Debt.

[48] PSSB is Pengkalen Securities Sdn Bhd and is now known as PM Securities, the plaintiff herein.

[49] I have no difficulty in construing and giving effect to the clear and unambiguous words used in cl. 3.1. As the first and second defendants have not appealed against the JID, the JID becomes final and conclusive, as a result of which, their liability thereunder is beyond dispute. Under cl. 3.1, the guarantor's ie, the third defendant's contractual obligation to indemnify the plaintiff is undoubted. My answer to the above question is in the affirmative.

[50] It is pertinent for me to point out that various other issues were raised by respective learned counsel in this appeal. However, in view of my answer to the above question, it is unnecessary for me to consider them, except to commend them for their efforts expended thereon.

Conclusion

[51] It follows that this appeal is allowed with costs here and in the court below. The order of the High Court is set aside and substituted with an order allowing the plaintiff's claim. I therefore make an order in terms of the plaintiff's claim against the third defendant.

[52] Deposit to be refunded to the plaintiff (appellant).